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Supreme Court, U.S.
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No. 07-422

IN THE

Supreme Court of the United States

TEMPLE UNIVERSITY HOSPITAL,

Petitioner,

v.

HUGH B. GALLAGHER, III AND JOANNE GALLAGHER, GUARDIANS OF THE ESTATE OF HUGH B. GALLAGHER, IV

Respondents.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a trial court erroneously submits a constitutionally defective claim for punitive damages to a jury in tandem with an underlying claim for compensatory damages, whether a reviewing court may presume that the constitutional error was harmless.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Temple University Hospital states that it is a private, 501(c)(3) corporation. Its parent company is Temple University Health System, Inc., the parent company of which is Temple University—Of The Commonwealth System of Higher Education. No publicly held company owns any stock at any level.

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INTRODUCTION

This Court has recognized repeatedly in recent years that punitive damages present a substantial risk of arbitrary and irrational deprivation of property, and hence are limited by the Due Process Clause of the Federal Constitution. *See, e.g., Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064-65 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003); *Cooper Indus., Inc. v. Leatherman*, 532 U.S. 424, 436-40 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572-75 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-32 (1994). Among the constitutional limitations that this Court has recognized is that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422.

The fundamental fairness concerns underlying this Court's punitive damages jurisprudence, however, are not limited only to excessive punitive damages awards, but also extend to compensatory damages awards tainted by punitive damages claims. This case is a perfect example. The trial court here not only allowed respondents to pursue a punitive damages claim based on conduct independent of the conduct upon which liability for negligence was premised, but also allowed the jury to consider liability for punitive damages in tandem with considering liability for negligence. The jury found petitioner liable for negligence, decided that punitive damages were warranted, and awarded $20 million in damages. When the trial court subsequently informed the jury that they were to consider *another* award of damages, they expressed surprise. And, after deliberating for less than an hour, they awarded respondents just $15,000 in punitive damages.

On review, the Pennsylvania appellate court recognized that the punitive damages claim could not pass muster under *State Farm*, and reversed the punitive

damages award. The court, however, refused to recognize the effect of that federal constitutional error upon the jury's simultaneous consideration of liability and compensatory damages. Rather, the court presumed that the federal constitutional error was harmless, and saddled *petitioner* with the burden of proving otherwise.

With all respect, the Pennsylvania appellate court thereby turned the law upside down. A federal constitutional trial error—to the extent subject to harmless-error review at all—is presumptively harmful, not presumptively harmless. Accordingly, the beneficiary of such an error bears the burden of proving that harmless-error review is warranted in the first place, and (if so) that the particular error did not, in fact, affect the aggrieved party's substantial rights.

By presuming that the constitutional error here did not affect petitioner's substantial rights, and saddling petitioner with the burden of proving otherwise, the Pennsylvania appellate court thus deprived petitioner of an appropriate remedy for the violation of its federal constitutional rights. That deprivation itself presents a important issue of federal law: constitutional rights would not be worth much if courts could simply presume that denials of such rights are harmless. The federal constitutional right recognized by this Court in *State Farm*, whereby a defendant may not be subjected to punitive damages based on conduct independent of the conduct on which compensatory liability is based, protects a defendant's substantial rights; that is why this Court recognized such a right in the first place.

Indeed, it is hard to see how the error at issue here could *not* have been prejudicial. It defies both common sense and human nature to suppose that a jury can consider whether a defendant's conduct is so reprehensible as to warrant punitive damages without letting that inquiry affect its simultaneous consideration whether tort liability is warranted in the first place, or

the amount of compensatory damages. For just this reason, several States have recognized that even a *proper* claim for punitive damages necessarily affects a jury's simultaneous consideration of liability and compensatory damages, and therefore require bifurcation of trials into separate compensatory and punitive phases. It follows *a fortiori* that where, as here, a claim for punitive damages is *erroneously* submitted to a jury in tandem with issues of liability and compensatory damages, the error necessarily affects the defendant's substantial rights.

This case, in short, shows that the risk of arbitrary and irrational deprivation of property presented by punitive damages claims is not neatly limited to punitive damages awards, but may spill over to taint compensatory damages awards. Because the Pennsylvania appellate court gave short shrift to the constitutional problems presented by such spillover, and ignored settled law regarding the remedy for a federal constitutional error, this Court should grant the petition and either summarily reverse the judgment or set this case for plenary review.

OPINIONS BELOW

The Pennsylvania Supreme Court's unpublished decision denying review of the decision below is reprinted in the Appendix ("App.") at 1a. The Superior Court's unpublished decision is reprinted at App. 2-10a. The Pennsylvania Supreme Court's prior decision is published at 901 A.2d 981, and reprinted at App. 11-12a. The Superior Court's prior decision is reported at 2005 WL 2649868, and reprinted at App. 13-26a. The Court of Common Pleas' unpublished decision is reprinted at App. 27-41a.

JURISDICTION

The Pennsylvania Supreme Court denied review on June 28, 2007. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment provides in relevant part that no State shall "deprive any person of ... property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Background

This case arises out of an unsuccessful attempt by respondents' then 19-year-old son, Hugh Gallagher, IV, to commit suicide by setting himself on fire in May 2000. The unsuccessful suicide attempt caused Gallagher to sustain burns over 70% of his body, and he was transferred to the Intensive Burn Care Unit of petitioner Temple University Hospital for treatment. App. 27a.

On the night of June 7, 2000, Gallagher was one of four patients being treated in the Intensive Burn Care Unit. App. 29a. At around midnight, an unusual series of three alarms in the unit required the attention of all three nurses on duty. Pennsylvania Superior Court Joint Reproduced Record ("Pa.Rec.") 288-91, 320-21. First, two nurses responded to a malfunctioning ventilator in a patient's room, which required one of the nurses to ventilate the patient manually. *Id.* at 316-17, 320. Then an alarm sounded in a second patient's room. *Id.* at 170-71. The third nurse, Janice Lawson, responded to this alarm. *Id.* Before doing so, however, Nurse Lawson checked on Gallagher, and confirmed that his vital signs were normal. *Id.* at 171, 271. After treating the other patient for approximately six minutes, Nurse Lawson returned and found that Gallagher's airway was blocked, he was not breathing, and his heart rate was zero. App. 28a; Pa.Rec. 241-44. Nurse Lawson and the other nurses worked quickly to restart his breathing and heart rate. *Id.*; *see also* Pa.Rec. 301-04. Gallagher survived, but suffered anoxic brain injury that will prevent him from living independently in the future. App. 28a.

After Gallagher was resuscitated and the other alarms were resolved, Nurse Lawson went back and completed Gallagher's critical care "flow sheet" to document the event and the treatment given. Pa.Rec. 202-04, 1592. Nurse Lawson first estimated the times on the flow sheet, and then used the data printed out from Gallagher's heart rate monitor to make corrections. *Id.* at 204-05, 236. Rather than crossing through the original estimates on Gallagher's flow sheet, Nurse Lawson used "Wite-Out" liquid paper, which made it impossible to read what was underneath and is against hospital policy. *Id.* at 210.

In addition, Nurse Lawson only printed out data from the heart rate monitor for the time at which Gallagher's pulse was zero, and not for any prior period. *Id.* at 234-35. As the heart rate monitor saved data for only 24 hours, this information was lost. *Id.* at 263.

The next day, petitioner's Risk Manager Janet Leech reviewed the original flow sheet and accompanying heart rate printout. *Id.* at 399-400. Ms. Leech made a copy of the original flow sheet, and placed the copy in Gallagher's medical file with a note that the original was "in Risk Management." *Id.* at 400, 403. Ms. Leech retained the original flow sheet and the heart-rate-monitor printout in her office for safekeeping. *Id.* at 400, 408.

B. Procedural History

In April 2001, respondents (Gallagher's parents and legal guardians) filed this medical malpractice lawsuit against petitioner in the Pennsylvania Court of Common Pleas (Bonavitacola, J.). App. 28a. The original complaint raised only a simple negligence claim based on the allegedly deficient care that led to Gallagher's brain injury. *Id.*

During discovery, petitioner produced records pertaining to Gallagher's treatment, including his medical file containing the copy of the critical care flow sheet. App. 31-32a. Because the original flow sheet and the

heart-rate-monitor printout were not in that file, however, they were not included in the materials produced in discovery. *Id.* Only later, on the eve of trial, did petitioner realize that the original flow sheet (with the "Wite-Out") had never been produced, and gave it to respondents. Pa.Rec. 205-08.

Following this belated disclosure, respondents moved at trial to amend their complaint to add a claim for punitive damages. App. 32a; Pa.Rec. 452; 794-811. This new claim was not based upon petitioner's conduct leading up to Gallagher's injury, but rather upon petitioner's *post*-injury conduct regarding the flow sheet. App. 32a; Pa.Rec. 795-805. Specifically, respondents argued that petitioner had engaged in a "cover-up" consisting of two distinct components: (1) Nurse Lawson's use of "Wite-Out" on the flow sheet, and (2) petitioner's failure to produce the original flow sheet in discovery. *Id.*; *see also* Pa.Rec. 802 ("[W]e have clear evidence of a malicious attempt to cover up the record...."). As the trial court later stated:

> The punitive damages claim in this case arises not from any aspect of the care rendered to Gallagher by [petitioner]; rather, it arises from the hospital's *post*-injury actions, which a jury could reasonably find were part of a course of conduct intended to prevent [respondents] from discovering the full extent of [petitioner's] negligence on the evening of June 7, 2000, and thereby to reduce or eliminate the likelihood of an adverse jury verdict.

App. 33a (emphasis added).

Petitioner repeatedly objected to respondents' motion to amend the complaint to add a punitive damages claim. Pa.Rec. 452, 806-09, 1152-53. In particular, petitioner argued that because the claim for punitive damages was not based on the same conduct as the underlying negligence claim, submitting both claims to the jury

simultaneously would taint the jury's consideration of the negligence claim and violate petitioner's rights under both federal and state law. *Id.* 1156-57, 1212-15.

The trial court overruled these objections, and allowed respondents to amend their complaint to add a claim for punitive damages. *Id.* at 1158-61. In addition, although the court's initial instinct was to submit the question of punitive liability to the jury only *after* the jury had reached a decision on compensatory da ıages, *id.* at 1149-50, 1153, the court ultimately reversed course and ordered that the questions on both medical malpractice and punitive liability would be submitted in tandem. *Id.* at 1160-61; App. 33-34a. The court thereby structured the trial to allow the jury to decide everything except the *amount* of punitive damages in the initial round.

During closing arguments, respondents' counsel repeatedly commingled the negligence and punitive damages issues, referring to an alleged "cover-up" and other post-injury actions by petitioner that had no bearing on the issue of medical malpractice. *See, e.g.*, Pa.Rec. 1175 ("How do we know they did the wrong thing separate and apart from the records themselves? Their conduct. Their conduct."); *id.* at 1179 ("Haven't we all learned by now ... that what you do wrong is never as bad as the cover-up, and that when you cover things up, people are going to conclude your conduct was much worse than what you admit to."); *id.* at 1183 ("[W]e weren't able to uncover everything that was involved in the cover-up"). Indeed, respondents' counsel concluded his closing argument as follows:

> Now, I told you this case was about two alarms. It's about that one alarm, Hugh Gallagher's alarm that went off and nobody came. Right? It's about another alarm. Where are all those people, by the way? Where are they? Where is Nurse Lawson? Where is the risk manager and the nurse manager? ... Where are these people

> that tried to deny me my rights in court by obliterating my records and not preserving that computer information? Where are they? They're at Broad and Ontario [petitioner's address in Philadelphia]. I can't shout that loud. That's what Hugh would say.
>
> There is this question here: Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV? That's the last question you have to answer. *That's not about the issue of not responding to alarms. It's not about that issue. It's about the cover-up.* That's the second alarm, ladies and gentleman. That's the alarm that you have to answer. They have to hear it. They have to hear it from you. Thank you.

Pa.Rec. 1208-10 (emphasis added).

The verdict form submitted to the jury contained four questions. *See id.* at 1382-83. The first three questions asked the jury to determine (1) whether petitioner was negligent in its treatment of Gallagher; (2) whether that negligence was a substantial factor in bringing about the harm; and (3) the amount of resulting damages sustained by Gallagher. *Id.* The fourth question asked the jury, "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of [Gallagher]?" *Id.* The jury responded affirmatively to each question and awarded respondents $20 million in damages. *Id.*; *see also* App. 28a.

After the jury was polled as to the verdict, the trial court informed them that their affirmative response to question four now required them to consider the amount of punitive damages to be awarded. Pa.Rec. 1317-18. The jury foreperson immediately interrupted and told the court: "I think the verdict we came to, because we half on one and half on the other, the question—" *Id.* at 1318. At

that point, the court cut her off before she could finish her statement. *Id.*

Petitioner's counsel immediately moved for a mistrial, because "[b]ased on the foreperson's statement, I believe what she was telling the Court was that they had already considered punitive damages in their deliberation. That's why I don't believe punitive damages are in the case. I argued that all along." *Id.* at 1319. The court denied petitioner's motion for a mistrial. *Id.* at 1320. The court also denied petitioner's request to submit a special interrogatory to the jury asking whether the damages verdict included punitive damages, *id.* at 1325-26, 1333, 1379-81, and refused a request from one of the jurors to speak to the court, *id.* at 1343.

The only additional evidence submitted to the jury regarding the amount of punitive damages was petitioner's net worth. *Id.* at 1344, 1348-49; App. 35a n.6. The jury deliberated for approximately forty minutes on the amount of punitive damages before returning a verdict of $15,000—*i.e.*, less than one-tenth of 1% of the $20 million compensatory damages award. Pa.Rec. 1375-76; *see also* App. 28a.

Petitioner filed a motion for a new trial. Pa.Rec. 1393-1431. In support, petitioner submitted two affidavits—one from a juror stating that the $20 million compensatory damage award included punitive damages, *id.* 1434, and the other memorializing a conversation to the same effect between another juror and a lawyer, *id.* 1435. The trial court, however, refused to consider these affidavits, denied the motion, and entered judgment against petitioner. App. 27-41a.

Petitioner timely appealed to the Pennsylvania Superior Court. Among its various challenges to the judgment, petitioner argued that the punitive damages claim was invalid under "both controlling federal constitutional law and Pennsylvania law," App. 16a, and that the trial court's error in submitting the issue of

punitive liability to the jury in tandem with the underlying issues of negligence and compensatory damages tainted the jury's negligence verdict and $20 million damages award, *see* App. 19-20a.

The appellate court agreed with petitioner in part, and reversed the $15,000 punitive damages award on the ground that "a defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages." App. 18a. Nonetheless, the appellate court rejected petitioner's further argument "that it is entitled to a new trial on the medical malpractice claim because it was prejudiced by the inclusion of the claim for punitive damages." App. 19a. In particular, the appellate court held that the error must have been harmless because respondents introduced no *evidence* with respect to punitive damages that they otherwise could not have introduced. App. 20a. Accordingly, the appellate court affirmed the $20 million compensatory award in respondents' favor. App. 26a.

Petitioner next sought discretionary review by the Pennsylvania Supreme Court, which was granted. App. 11a. In a brief *per curiam* order, the Supreme Court vacated the Superior Court's ruling affirming the $20 million compensatory judgment in respondents' favor. *Id.* As the court explained, "the reason the Superior Court gave for its determination that Petitioner sustained no prejudice as a result of the trial court's error is insufficient to support that determination." *Id.* The Supreme Court thus remanded the case and ordered the Superior Court "to review the record and reconsider" the question of prejudice, and, if it could not decide the matter based on the record, to remand for a new trial. App. 11-12a.

On remand, however, the Superior Court summarily reaffirmed its prior conclusion that petitioner had not been prejudiced by the trial court's erroneous submission of the punitive damages claim to the jury. App. 2-10a.

This time, the appellate court made it crystal clear that it was starting from the premise that the error was harmless unless *petitioner* could prove otherwise. App. 2a ("[T]he record reflects that [petitioner] has failed to demonstrate that it suffered any prejudice."); App. 5a (same); App. 9a ("[Petitioner] has failed to show prejudice."). In particular, the Superior Court rejected petitioner's argument that respondents' *arguments* relating to liability for punitive damages ("It's about the cover-up," Pa.Rec. 1209) necessarily tainted the jury's consideration of compensatory liability and damages. App. 5-6a. According to the Superior Court, there could have been no prejudice because the jury was not instructed to award punitive damages, and therefore considered the issue of liability for punitive damages "in [a] vacuum." App. 7a.

Petitioner again sought discretionary review by the Pennsylvania Supreme Court. That court, however, denied such review on June 28, 2007. App. 1a. This petition follows.

REASON FOR GRANTING THE WRIT

The Pennsylvania Appellate Court Violated Due Process By Presuming That The Jury's Consideration Of An Invalid Punitive Damages Claim Was Harmless.

Underlying this Court's punitive damages jurisprudence of the past two decades is the basic insight that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda*, 512 U.S. at 432. That insight, however, is not limited only to punitive damages awards. Rather, a constitutionally invalid punitive damages claim may taint a jury's consideration of underlying tort liability and compensatory damages. The award of $20 million in "compensatory" damages in this case proves the point.

As a threshold matter, it is axiomatic that the proper remedy for a federal constitutional error, even in state courts, presents an issue of federal law. *See, e.g.*, *Chapman v. California*, 386 U.S. 18, 21 (1967). Here, as the Pennsylvania appellate court noted, petitioner argued that the trial court violated its rights under *both* federal constitutional law and state law by submitting respondents' punitive damages claim to the jury. *See* App. 16a. The court agreed with that argument in language drawn virtually verbatim from this Court's decision in *State Farm*. *Compare* App. 18a ("[A] defendant's acts that are independent from the conduct on which liability is premised may not serve as the basis for punitive damages.") *with State Farm*, 538 U.S. at 422 ("A defendant's ... acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). To the extent that the Pennsylvania appellate court did not specify whether its decision to reverse the punitive award rested on federal or state grounds, of course, the presumption is that the decision rested on federal grounds. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 261-62 (1989); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

The Pennsylvania appellate court, however, proceeded to saddle *petitioner* with the burden of showing prejudice from that error, and held that petitioner had failed to carry that burden. *See* App. 2-9a; 19-22a. That approach to the proper remedy for a federal constitutional error is manifestly erroneous.

The key point here is that, as a matter of federal law, the error of submitting an unconstitutional punitive damages claim to a jury in tandem with a compensatory damages claim is inherently prejudicial. Such an error affects the jury's consideration of the compensatory claim in ways that cannot be isolated or quantified. It is not a mere "trial error," like the erroneous admission or exclusion of a particular piece of evidence or an improper instruction, the impact of which "may ... be quantitatively

assessed" in the overall context of the trial. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). Rather, it is a structural error in the trial, and hence impervious to harmless-error review. *Cf. id.* at 306-12 (articulating standard for federal constitutional claims impervious to harmless-error review). It is almost as if the jury erroneously had been asked to decide two separate cases at once—an error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310.

It is simply impossible, as a matter of law or fact (not to mention common sense), to expect a jury considering evidence and/or argument regarding tort liability and compensatory damages not to be affected by concurrent evidence and/or argument regarding liability for punitive damages. Indeed, for this very reason, eight States have mandated bifurcation of compensatory and punitive liability altogether, at least upon a party's request. *See, e.g.*, Ark. Code § 16-55-211; Minn. Stat. § 549.20; Miss. Code § 11-1-65(1); N.J. Stat. § 2A:15-5.13; N.C. Gen. Stat. § 1D-30; N.D. Cent. Code § 32-03.2-11(2); Ohio Rev. Code § 2315.21(B); Va. Code § 8.01-374.1(B).[1] Social science

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[1] It is undisputed that no such bifurcation occurred here, and that the jury considered liability for negligence and compensatory damages in tandem with liability for punitive damages. The jury determined in the first phase of the trial that petitioner's conduct was "willful or wanton or ... reckless[ly] indifferen[t] to the rights of Hugh Gallagher, IV"—the predicate for an award of punitive damages under Pennsylvania law. App. 6-9a & n.3, 21-22a, 24a, 34a. Accordingly, the Pennsylvania appellate court's blanket assertion (in its first, vacated decision) that "[t]he trial court was careful to bifurcate the punitive damages claim from the compensatory claim," App. 20a, is misleading at best. *See also* App. 9a (referring to "the trial court's careful bifurcation of the relevant questions concerning compensatory *liability* and punitive *liability*") (emphasis added). Here, the trial court split

confirms the insight on which those statutes are based: submitting claims of liability for compensatory and punitive damages in tandem inherently tends to influence a jury's determination of compensatory liability. *See* Stephan Landsman *et al.*, *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 Wis. L. Rev. 297, 321, 334 (1998); *see also* Steven S. Gensler, *Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons from Tennessee*, 67 Tenn. L. Rev. 653, 666 & 669-70 (2000) (same); I John J. Kircher & Christine M. Wiseman, *Punitive Damages: Law & Practice* § 12:01, at 12-2 (2d ed. 2000) ("[C]ourts and commentators have recognized the potential prejudice *inherent* in permitting the jury to simultaneously receive evidence relative to the underlying cause of action and the demand for punitive damages.") (emphasis added); *see also id.* ("Introducing evidence which probes the reckless or malicious nature of defendant's conduct to support a punitive damage award ... threatens also to influence the jury's determination of substantive liability and compensatory damages.").

If a jury's consideration of a *proper* punitive damages claim affects its simultaneous consideration of compensatory damages, it follows that a jury's consideration of an *invalid* punitive damages claim affects the jury's simultaneous consideration of compensatory damages. *See, e.g.*, *Burke v. Deere & Co.*, 6 F.3d 497, 513 (8th Cir. 1993) ("The law is ... squarely against letting a contested compensatory award stand when punitive damages are set aside."); *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888, 897 (Miss. 2006) (granting

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off only the jury's consideration of the *amount* of punitive damages; it did not bifurcate the issue of *liability* for compensatory damages from the issue of *liability* for punitive damages.

new trial on compensatory damages after trial court erroneously failed to bifurcate, given that "we can never know the full effect the premature hearing of the punitive damages evidence had on the jury's verdict for compensatory damages"); *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 313 (Ga. Ct. App. 1994) ("[A]ny reversible error in the admission of evidence pertaining to the entitlement to punitive damages makes it difficult, if not impossible, to affirm a judgment on the compensatory claim, when both claims are litigated in the same phase of the trial."), *limited in part on other grounds*, *Webster v. Boyett*, 496 S.E.2d 459, 463 (Ga. 1998); *cf. Hall v. Babcock & Wilcox Co.*, 69 F. Supp. 2d 716, 733 (W.D. Pa. 1999) ("[T]here is no reason to believe that the jury did not place all the evidence of Defendants' wrongful conduct on the scale when determining whether Plaintiffs met their burden of proof on the issues of liability and compensatory damages."); *Francis v. Coughlin*, 755 F. Supp. 618, 619-21 (S.D.N.Y. 1991) (granting a new trial on both compensatory and punitive damages where, as here, jury's relative awards of compensatory and punitive damages suggested that jury included punitive component in compensatory award).

Thus, once the Pennsylvania appellate court determined that the trial court erred by submitting respondents' punitive damages claim to the jury, the court was not entitled to presume that the error was harmless and did not affect the $20 million compensatory award. But even putting aside the basic point that the error here is impervious to harmless-error review at all, the Pennsylvania appellate court still erred by saddling *petitioner* with the burden of proving that the error was harmful, instead of requiring respondents to prove that the error was harmless. In the criminal context, at least, it is black-letter law that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24; *see also Sullivan v.*

Louisiana, 508 U.S. 275, 278-82 (1993); *Fulminante*, 499 U.S. at 295-96. Given that punitive damages are "'quasi-criminal,'" and "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing," *Cooper Indus.*, 532 U.S. at 432, it follows as a logical matter that the *Chapman* standard should govern any harmless-error inquiry involving punitive damages claims.

But even putting aside the question whether the stringent *Chapman* standard applies in this context, at the very least the Pennsylvania appellate court erred by presuming that the error was harmless, and saddling petitioner with the burden of proving otherwise. Even in civil cases, courts may not presume that a federal constitutional error was harmless. *See, e.g.*, *Fry v. Pliler*, 127 S. Ct. 2321, 2325-28 (2007); *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *Brecht v. Abrahamson*, 507 U.S. 619, 627 (1993); *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Although these cases involve habeas corpus review of criminal convictions, their harmless-error analysis is not limited to that context. To the contrary, "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *O'Neal*, 513 U.S. at 441; *see also id.* ("[T]he current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to [the same statute] as their statutory source."); *id.* at 442 ("[E]ven if ... we were to assume that the civil standard for judging harmlessness applies to habeas proceedings ... it would make no difference.").

Thus, both federal and state appellate courts have recognized—in sharp contrast to the court below—that "presuming prejudice, rather than harmlessness, is required by Supreme Court precedent" as a general matter, in civil as well as criminal cases, with respect to constitutional errors and other errors affecting

substantial rights. *Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005). A reviewing court must "begin with a presumption of prejudice" that "can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if [the error had not occurred]." *Id.; see also Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 886 (10th Cir. 2006) ("[W]e must reverse unless we find that this jury's verdict more probably than not was unaffected by the error.") (citing *Obrey*); *Jerden v. Amstutz*, 430 F.3d 1231, 1240 (9th Cir. 2005) ("[W]e start with 'a presumption of prejudice.'") (quoting *Obrey*, 400 F.3d at 701); *In re Vanessa M.*, 138 Cal. App. 4th 1121, 1132 (Cal. Ct. App. 2006) (holding that burden of proving harmlessness of federal constitutional error rests on party that benefited from the error); *A.B. v. Y.Z.*, 878 A.2d 807, 811-12 (N.J. 2005) (*per curiam*) (same); *cf. Stockman v. Oakcrest Dental Ctr. P.C.*, 480 F.3d 791, 799 (6th Cir. 2007) ("Generally, a *non-constitutional* trial error is harmless unless it is more probable than not that the error materially affected the verdict.") (emphasis added; internal quotation and citation omitted). That rule has the virtue of comporting not only with law but with fairness: the beneficiary of an error, not its victim, should bear the burden of proof with respect to the error's impact. Needless to say, the decision below, which imposed the burden of proving prejudice on the party aggrieved by a constitutional error, *see* App. 2a, 5a, 9a, cannot be reconciled with these precedents.

And even beyond the error of putting the burden on the wrong party, the Pennsylvania appellate court's analysis fails on its own terms. Respondents told the jury that punitive damages were warranted because petitioner had engaged in a "cover-up" by belatedly producing a key document in discovery. As respondents' counsel put it to the jury: "Was the conduct of Temple University Hospital willful or wanton or with reckless indifference to the rights of Hugh Gallagher, IV? That's the last question

you have to answer. That's not about the issue of not responding to alarms. It's not about that issue. *It's about the cover-up.*" Pa.Rec. 1209 (emphasis added). It defies law and logic to suppose that this argument—that petitioner's *post*-injury conduct was "willful," "wanton," or "reckless[ly] indifferen[t]," *id.*—in no way affected the jury's consideration of negligence and compensatory damages. The Pennsylvania appellate court, however, simply asserted (after the Pennsylvania Supreme Court rejected its original harmless-error analysis as "insufficient," App. 11a) that the punitive damages claim must have been harmless because "[petitioner's] counsel did not request, and the trial court did not instruct, the jury to make any *award of punitive damages* or even explain the function of such damages or the factors that go into *making a punitive award* until after a verdict in the negligence phase was rendered." App. 7a (emphasis added).

That assertion, of course, assumes that the issue here is whether the $20 million compensatory award is an "award of punitive damages." But that is only a *label* that obscures the real issue. The real issue is whether the invalid punitive damages claim *affected* the $20 million compensatory damages verdict. Notwithstanding the remand from the Pennsylvania Supreme Court, the Pennsylvania appellate court never addressed that critical issue.

The bottom line here is that state courts, no less than federal courts, have a duty to vindicate federal rights. *See, e.g., Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 99-100 (1993). The court below abdicated that duty by saddling petitioner with the burden of showing prejudice from a federal constitutional error, and breezily dismissing the error here as harmless. This Court should not tolerate such abdication. As a matter of federal law, petitioner is "entitled to a trial free from the pressure of unconstitutional inferences," *Chapman*, 386 U.S. at 26, and the Pennsylvania appellate court deprived petitioner

of that federal right by affirming the $20 million compensatory award in this case notwithstanding the unconstitutional punitive damages claim.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either summarily reverse the judgment or set the case for plenary review.

Respectfully submitted,

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